BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of	)	
	)	NO. 84A-1260-VN
CLIFFORD T. ROBINSON	)	
	)	

Appearances:

For Appellant: Clarence White
Certified Public Accountant

For Respondent: Karen D. Smith
Counsel

OPINION

This appeal is made pursuant to section 18593[1]/ of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Clifford T. Robinson against proposed assessments of additional personal income tax in the amounts of $13,942.41, $7,481.00, and $8,149.00 for the years 1979, 1980, and 1981, respectively.

1/ Unless otherwise specified, all section references are to sections of the Revenue and Taxation code as in effect for the years in issue.

Appeal of Clifford T. Robinson

Appellant Clifford T. Robinson is a professional athlete who plays basketball in the National Basketball Association (NBA). During the years in issue, he played for the New Jersey Nets and Kansas City Kings. The issue presented for decision is whether appellant has shown error in respondent's determination that he, rather than his professional service corporation, was taxable on income from a professional sports contract and shoe endorsement agreement.

In June 1979, appellant formed a professional service corporation called "Cliff Robinson, Inc." (corporation) under the laws of the State of California. Appellant became the president of the corporation and owner of 84 percent of its stock. The remaining 16 percent of stock was split among seven members of appellant's family.2/ On August 18, 1979, appellant signed a NBA Uniform Player contract with the Meadowlands Basketball Associates (basketball club) to play for its team, the New Jersey Nets. Pursuant to a contract addendum setting forth compensation, the basketball club agreed to pay appellant a signing bonus of $100,000 and a guaranteed salary of $400,000 over the next three years. The record of this appeal contains two copies of the player contract and one copy of the compensation addendum, all of which were signed by appellant. One of the copies of the player contract shows that "Cliff Robinson, Inc.," was the contracting party and that appellant signed on behalf of the corporation. However, on the other copy of the player contract as well as the addendum, references to the corporation have been stricken by obliterating all the "Inc." designations. As a result, the contracting party on these documents is shown to be "Cliff Robinson." On the other hand, a separate addendum to the player contract indicates that the basketball club agreed to make an interest-free loan of $125,000 to the corporation. Appellant signed this loan agreement on behalf of the corporation.

On November 10, 1979, appellant executed the following "Personal Guarantee by Player" in which he declared that he would perform the services required under the player

2/ On August 29, 1979, the Notice of Issuance of Securities Pursuant to Subdivision (h) of section 25102 of the California Corporations code was executed by appellant as president of the corporation. This notice was filed with the Department of Corporations on September 4, 1979,

contract that the corporation had purportedly entered into with the New Jersey Nets club:

> I, Cliff Robinson, in order to induce Meadowlands Basketball Associates (N.J. Nets) (hereinafter called the "Club") to enter into the annexed Player Contract with Cliff Robinson, Inc. (hereinafter called the "Company"), and intending the Club to rely hereon, do hereby pake the following representations, warranties, and agreements:
>
> 1. I have read the annexed Player 'Contract (and any amendments, riders, and addenda thereto), and understand that it calls for the Company to provide my services as a professional basketball player. In consideration of the promises, conditions, and 'provisions contained'in said Player Contract, I hereby expressly accept and agree to be bound by all the terms and conditions thereof.
>
> 2. The company has the right to enter into the annexed Player Contract, to grant all the rights therein granted, and to supply my services to the Club pursuant to the terms thereof. I will cause the company to perform all of its obligations pursuant to the terms of the annexed Player Contract.
>
> 3. I will perform and supply all of the services which the Company has agreed to perform and supply to the Ciub pursuant to the 'terms of the annexed Player contract.

This personal guarantee statement was signed by appellant as president of the corporation and witnessed by a Charles Robinson. The basketball club was not a party or signatory to this document.

On November 26, 1979, appellant signed a $42,000 contract with BRS, Inc. (BRS), to wear and endorse Nike shoes for three years. BRS made this endorsement agreement specifically with "Cliff Robinson ('Player')." When appellant signed the agreement, he added the title of president after his signature. Charles Robinson also signed the agreement and indicated that he was chairman. Instead of appellant's social security number, the federal employer identification number of the corporation was placed on the endorsement agreement.

On his returns for the three years under appeal, appellant reported income to the extent of wages allegedly received as an employee of the corporation. Amounts received for services rendered under the player contract and shoe endorsement agreement were reported as income of the corporation. On audit, the Franchise Tax Board determined that appellant entered into these contracts and was therefore taxable on the income earned therefrom. Respondent issued appellant deficiency assessments. Following the denial of his protest against the assessments, appellant filed a timely appeal with this board.

A fundamental principle of income tax law is that income must be taxed to the person or entity who earned it. (Commissioner v. Culbertson, 337 U.S. 733, 739-740 [93 L.Ed. 1659 (1949).) However, in cases involving closely-held corporations that rely on the personal-services of a principle employee to produce corporate income, the true earner of the income cannot always be identified by simply pointing "to the one actually turning the spade or dribbling the ball", for recognition must be given to the nature of the corporate business form. (Johnson v. Commissioner, 78 T.C. 882, 290 (19821, affd. without published opinion 734 F.2d 20 (9th Cir.), cert. den. 469 U.S. 857 [83 L.Ed.2d 1191 (1984).) After all, a corporation, in addition to being a separate legal entity, is a separate taxpayer for tax purposes. (Moline Properties v. Commissioner, 319 U.S. 436, 438-439 [87 L.Ed. 14991 (1943).)

In determining whether an individual or his professional service corporation is taxable with respect to income earned through the performance of personal services, the courts have stated that the relevant inquiry is whether the individual or the corporation controls the earning of the income, not who ultimately receives the income. (See Vercio v. Commissioner, 73 T.C. 1246, 1253 (1980); Vnuk v. Commissioner, 621 F.2d 1318, 1320 (8th Cir. 1980).) Using this approach, the United States Tax Court in Johnson v. Commissioner, supra, held that two necessary elements must be present before the corporation, rather than its service-performer employee, will be considered the controller of the earning of the income. First, the service-performer employee must be in fact an employee of the corporation whom the corporation has the right to direct or control in some meaningful sense. Second, there must exist between the corporation and a third party using the services of the employee a contract or agreement which recognizes the corporation's

controlling position. (See Johnson v. Commissioner, supra, 78 T.C. at 891, and cases cited therein.)

It is well settled that respondent's determinations with regard to the imposition of taxes are presumptively correct, and the taxpayer-bears the burden of showing error in those determinations. (Appeal of K.L. Durham, Cal. St. Bd. of Equal., Mar. 4, 1980; Appeal of Myron E. and Alice 2. Gire, Cal. St. Bd. of Equal., Sept. 10, 1969.) Here, in order to es-tablish that the amounts paid pursuant to the player contract and shoe endorsement agreement was taxable to his personal service corporation and not to him, appellant must show that the corporation controlled the earning of such income under the twin standards of the Johnson case. We find that he has not made this showing.

First, while appellant has contended that he was but one of several employees of the corporation, he has failed to present probative evidence that an employee-employer relationship existed between himself and the corporation and that he was subject to its discretion and control in any manner. In an attempt to overcome the lack of an actual employment contract with the corporation, appellant has argued that the personal guarantee statement is a substitute employment agreement, for it indicates that the corporation had the right and authority to bind him to, a player contract and was executed expressly to "induce" the New Jersey Nets club to enter into a player contract with the corporation. we are not persuaded by appellant's argument. Nowhere in the personal guarantee does it state that appellant is an employee of the corporation or that the corporation had the right to control his activities as a professional basketball player. Rather, it can be inferred from the personal guarantee that it was the appellant who was the controlling party since it provides that appellant "will cause the [corporation] to perform all of its obligations . ..." We also note that, while the personal guarantee indeed indicates that the corporation had the right to bind him to a player contract, appellant had already signed the player contract with his club almost three months before he executed the personal guarantee ex parte. Finally, there is no evidence in the record that the corporation ever actually exercised any control over appellant's performance of services as a professional basketball player.

Second, appellant has not presented sufficient evidence of any contract which shows that either the basketball club or BRS recognized the corporation as controlling appellant's professional basketball activities. It has been appellant's contention throughout these proceedings that the corporation contracted with the basketball club and BRS. However, appellant has not explained why references to the corporation were stricken from the player contract and compensation addendum. In addition, the shoe endorsement contact, which called for the wearing of Nike shoes and making of public appearances, was executed with Cliff Robinson and not with Cliff Robinson, Inc. While it may be argued from the use of the name Cliff Robinson instead of appellant's proper name, the making of a loan to the corporation by the basketball club, and the purported execution of the shoe endorsement contract by appellant in his corporate capacity that the basketball club and BRS was aware of the existence of appellant's professional service corporation, the absence of conclusive evidence that the corporation was the actual contracting party to either the player contract or shoe endorsement agreement is fatal to appellant's case. Under the circumstances, it is difficult for us to find that the basketball club or BRS recognized when they executed their contracts that had corporation had control of appellant's performance of services.

Based on the record in this appeal, we must conclude that appellant has failed to carry his burden of proving that the corporation controlled the earning of income paid with respect to services rendered under the player contract and shoe endorsement agreement.&/ Accordingly, respondent's determination that appellant was taxable on this income must be sustained.

3/ Appellant has submitted into the record a deficiency assessment issued by respondent to the corporation based on an Internal: Revenue Service (IRS) audit report for the income year ended June 30, 1983. The federal audit report made certain adjustments to the income of the corporation. Based on respondent's use of the report, appellant has argued that respondent has acknowledged his personal service corporation controlled the earning of'income during the earlier appeal years. Appellant's argument is meritless. As respondent has pointed out, the federal audit report is not for the years in issue and does not reveal whether the IRS considered this issue. Even if it had, it is well established that respondent is not bound. to adopt the conclusions reached by the IRS in any particular case. (Appeal-of David G. Bertrand, Cal. St. Bd. of Equal., July 30, 1985.)

Appeal of Clifford T. Robinson

ORDER.

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation code, that the action of the Franchise Tax Board on the protest of Clifford T. Robinson against proposed assessments of additional personal income tax in the amounts of $13,942.41, $7,481.00, and $8,149.00 for the years 1979, 1980, and 1981, respectively, be and the same is hereby sustained.

Done at Sacramento, California, this 1st day of April, 1988, by the State Board of Equalization, with Board Members Mr. Dronenburg, Mr. Collis, and Mr. Davies present.

Ernest J. Dronenburg, Jr., Chairman

Conway H. Collis, Member

John Davies*, Member

_____, Member

_____, Member

*For Gray Davis, per Government Code section 7.9